Office - Supreme Court, U.S.
FILED
SEP 28 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 462

ABRAM FLAXER, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID REIN
JOSEPH FORER
711 Fourteenth Street, N. W.
Washington, D. C.
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute and Resolutions Involved	3
Statement of the Case	5
Reasons for Granting the Writ	11
Conclusion	20

Cases Cited

Bowman Dairy Co. v. United States, 341 U. S. 214	14
Christoffel v. United States, 338 U. S. 84	17
Florida v. United States, 282 U. S. 194	14
Kentucky v. Dennison, 65 U. S. 66	14
Kilbourn v. Thompson, 103 U. S. 168	11
Newton v. Commissioners, 100 U. S. 548	14
Piedmont & Northern Ry. Co. v. I.C.C., 286 U. S. 299	18
Quinn v. United States, 349 U. S. 155	11, 12, 13, 17, 19
Schlemmer v. Buffalo R. & P.R. Co., 205 U. S. 1	18
Sinclair v. United States, 279 U. S. 263	11, 12, 13
United States v. Dickson, 1 Pet. 141	18
United States v. Flaxer, 112 F. Supp. 669	1
United States v. Kamp, 102 F. Supp. 757	19
United States v. Patterson, 206 F. 2d 433	14
United States v. Rumely, 345 U. S. 41	12
United States v. Scharton, 286 U. S. 518	18
Wilson v. North Carolina, 169 U. S. 586	14

Statutes and Legislative Material

2 U. S. Code, sec. 192	1, 3
28 U. S. C. 1254(1)	2
Sen. Res. 180, 81st Cong. 2d Sess.	4, 17
Sen. Res. 366, 81st Cong. 2d Sess.	4
Rule XXV of the Standing Rules of the Senate	4, 17
Sen. Rep. 1208, 81st Cong. 2d Sess.	17
96 Cong. Rec.	17, 18

Page

BOOKS AND MISCELLANEOUS

Barth, Government by Investigation (1955) 12, 18
Chafee, The Blessings of Liberty (1956) 12
Taylor, Grand Inquest (1955) 12
Carpenter, July 1952 15
Catering Industry Employee, May 1952 15
The Road Ahead, April 1953 15

IN THE

Supreme Court of the United States

October Term, 1956

No.

ABRAM FLAXER, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia convicting the petitioner of violating 2 U.S. Code, sec. 192.

OPINIONS BELOW

The opinion of the trial court denying petitioner's motion for a judgment of acquittal is reported at 112 F. Supp. 669 and is reproduced at R. 14-20. The case

was first heard below by a regular three-judge division composed of Chief Judge Edgerton and Judges Miller and Fahy. Before the division announced a decision, the full Court of Appeals on its own motion ordered reargument before the court in banc. The in banc court affirmed by a vote of four to three, with Chief Judge Edgerton and Judges Bazelon and Fahy dissenting. The opinion of the court below has not as yet been reported. It appears at R. 98-116 and is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1956 (R. 97, Appendix A, infra), and a petition for rehearing was denied on July 30, 1956 (R. 122). By order of Mr. Justice Black, the time for filing a petition for certiorari was extended to September 28, 1956. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conviction of a union president for contempt of Congress for failure to produce to a Congressional subcommittee the names and addresses of the 35,000 members of his labor union may be sustained, there being no evidence of the purpose for which the subcommittee desired the names or of the use to which the names would be put, no other evidence of pertinency to a matter under inquiry, and no showing of a legislative purpose for the demand for the names.

2. Whether it was permissible for the court below to find pertinency and a legislative purpose in the absence of evidence on the subject, by conjecturing

that the subcommittee desired the names in order to check them "against a list of subversives to determine the extent of infiltration into the union."

3. Whether the purpose conjectured by the court below is a valid legislative purpose and consistent with the Constitution.

4. Whether under the Senate rules and the Senate resolution establishing the subcommittee, one member of the subcommittee constituted a quorum for the purpose of ruling on objections to the validity of a subpoena duces tecum to produce the names and addresses of 35,000 members of a labor union.

5. Whether the petitioner was guilty of a wilful default for the failure to produce these membership lists at a hearing at the conclusion of which he was directed to produce the records not then and there, but within ten days.

STATUTE AND RESOLUTIONS INVOLVED

Rev. Stat. § 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, 2 U. S. C. § 192 provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 or less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Cong., 2d Sess., established the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate and authorized that subcommittee to make a "study and investigation" of the following:

> "(1) The administration, operation and enforcement of the Internal Security Act of 1950;
>
> (2) The administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and
>
> (3) The extent, nature and effects of subversive activities in the United States; its territories and possessions, including, but not limited to espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organization controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

Section 2 of the Resolution provides as follows:

> "A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony."

Senate Resolution 180, 81st Cong., 2d Sess. amended subsection (3) of Rule XXV of the Standing Rules of the Senate, to read as follows:

> "3(a) Except as provided in paragraph (b) of this subsection, each standing committee, and each subcommittee of any such committee, is author-

ized to fix the number of its members (but not less than one third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee subject to the provisions of Section 133(d) of the Legislative Reorganization Act of 1946.

(b) Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony."

The new matter introduced by Resolution 180 is subparagraph (b).

STATEMENT OF THE CASE

The two-count indictment charged that the petitioner had failed to comply with a subpoena to produce certain records of the United Public Workers of America (herein called the Union) before the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate (herein called the Subcommittee). The first count of the indictment charged that the petitioner had refused to produce on October 5, 1951, the records of the Union showing "names and addresses for all members who are employed by the Federal Government of the United States of America." The second count charged that the petitioner had refused to produce on that date the records of the Union showing the "names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America" (R. 2-3). The petitioner was convicted on both counts (R. 94).

On September 19, 1951, the petitioner, then president of the Union, was served with a subpoena which reads in part as follows (R. 63):

> "Pursuant to lawful authority, you are hereby commanded to appear before the Subcommittee on Internal Security of the Committee on the Judiciary of the Senate of the United States, on Friday, October 5, 1951, at 10 o'clock a.m., at their committee room, 424 Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matter under consideration by said committee. You are commanded to produce and bring with you such records of the union known as United Professional Workers of America, which records will show the total amount of funds now in possession of the union; the source from which union funds are obtained; the places at which union funds are on deposit; and a list of those organizations to which the union has contributed within the past 12 months. And bring with you also records showing names and addresses for all members of the United Professional Workers who are employed by the Federal Government of the United States of America, and records showing names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America."

This subpoena had been prepared by the staff of the Subcommittee. The Subcommittee itself had not approved the subpoena or its contents by any formal action, and there is no evidence that the members of the Subcommittee had authorized its preparation informally. (See R. 54-61.)

The petitioner appeared before the Subcommittee on October 5, 1951. Only one member of the Sub-

committee, Senator Watkins, was present (R. 38). At the outset of the hearing, petitioner objected to the absence of a quorum. Senator Watkins ruled that one Senator constituted a quorum and stated that petitioner's objection would be noted on the record (R. 38-9).

The petitioner produced, as requested by the subpoena, records showing the amount, source, and place of deposit of the Union's funds and the organizations to which the Union had contributed during the preceding 12 months (R. 40-41). He answered orally all questions put to him concerning the Union, including questions on the nature of the Union, its method of operation, its activities, its finances, the total number of its members, and the agencies in which Union members were employed (R. 39-41, 43-46). His answers showed that the Union had approximately 35,000 members, of whom 5 percent were federal employees, and the remainder being employees of state, county and municipal governments, mostly the last (R. 43-44). The bulk of the members working for the Federal government were employed in the Bureau of Engraving, the Post Office, and the Veterans' Administration (R. 43). The petitioner further explained that since the Union consisted of government employees, it did not have bargaining rights as did unions in private industry; instead, the Union handled grievances for its members and appeared at wage hearings before budget commissions or before legislative bodies on legislation affecting government employees (R. 44-5).

The petitioner objected, however, to that portion of the subpoena which called for the production of the names and address of all of the members of the

Union. He argued that the request for the names was improper invading "the rights of unions to the privacy of their membership records" (R. 41). He stated (R. 42):

> "Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and the 'right to be let alone' which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpoena would be a violation of the trust imposed in me by my membership and a betrayal of the entire trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.
>
> "I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpoena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists."

After some colloquy, Senator Watkins stated to the appellant: "You are directed by the committee to produce those records according to the terms of the subpoena." (R. 47).

The petitioner immediately asked for reconsideration. He said (R. 47): "Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal em-

ployees". Senator Watkins stated (R. 48): "I do not think any court would ever resolve itself against the United States finding out what organization its members belong to." (R. 48-9).

In reply to a question by the Subcommittee's counsel, the petitioner said that he could prepare the information called for in a week (R. 49). The counsel then said, "I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time." Senator Watkins immediately said to the petitioner, "Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made" (R. 49).

The petitioner again asked for reconsideration. He said (R. 49): "I would like to suggest to the committee to reconsider that. I think you ought to consider it in the light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists." The discussion was concluded with this final exchange (R. 50):

> "Mr. Arens: Will you produce it pursuant to the order of the chairman of this session within 10 days from today?
>
> Mr. Flaxer: I will have to take that under consideration.

> Senator Watkins: That is the order, and of course, we will have to take whatever steps are necessary if at the end of the time you have not produced them."

At the trial, Richard Arens, counsel for the Subcommittee, testified that the Subcommittee had information that the petitioner, the Union's Secretary-Treasurer, its former Negotiations Director, and "certain" members of its executive board, were members of the Communist Party (R. 51-53). Neither Arens nor any other witness gave any testimony as to what was the subject under inquiry or the pertinency of the membership list of the Union to any subject. Nor is there any evidence in the record of why the Subcommittee wished the names and addresses of the 35,000 union members or what use it intended to make of that information.

The court below stated in its opinion that "the subcommittee decided to conduct an investigation as to whether [the Union's] membership was infiltrated by [Communists]." (App. B, p. 2) There is, however, no evidence in the record to this effect.

Having thus conjectured a subject matter for the inquiry, the court below held that the membership list was pertinent to the conjectured subject because "the names could be used to check against a list of subversives to determine the extent of infiltration into the union." (App. B, p. 9) There is no evidence in the record however that such was the Subcommittee's purpose or, for that matter, that the Subcommittee or any other agency of government possesses a master list of "subversives."

REASONS FOR GRANTING THE WRIT

1. This case involves the most extreme assertion of the legislative inquiry power which has yet been made. A major question arises as to whether the court below has discarded recognized limitations on the inquiry power.

Never before has a labor union officer been convicted for refusing to produce to a Congressional committee the membership lists of his union. Never before, so far as we have been able to ascertain, has a committee made such a sweeping demand.

The Subcommittee's unprecedented subpoena sought to invade the privacy of the 35,000 individuals who were members of the Union. These were to be stigmatized by being listed in the archives of a committee operating in the area of internal security, and were thereby to be ever subject to being slandered at some crucial point in their affairs.[1] The Committee's subpoena also infringed the hard-won tradition of the American labor movement that labor unions may not be required to divulge the names of their members.

This intrusion into private matters was not supported by any showing of a legislative purpose and of pertinency to a matter under inquiry, although such a showing is a prerequisite to a conviction for obstructing a legislative investigation. *Quinn* v. *United States*, 349 U. S. 155, 161; *Sinclair* v. *United States*, 279 U. S. 263, 296-7; *Kilbourn* v. *Thompson*, 103 U. S.

---

[1] Cf., the recent episode involving Attorney General Javits of New York, who was attacked on the basis of information in the possession of this same Subcommittee on the eve of his nomination as a Republican candidate for the United States Senate.

168. The decision below can not be reconciled with the holding in *Sinclair* that in a contempt case the government has the burden of proving pertinency to an authorized purpose.

The court below held that the Subcommittee desired to match the names of the union members against a list of "subversives" in order to determine whether the Union had been infiltrated by "subversives." This holding was unsupported conjecture. Nothing of the sort was suggested by the Subcommittee or by the government's evidence. The only evidence which had any conceivable bearing on the subject of the inquiry was testimony that the Subcommittee had information that union officers were Communists. This fails to establish any legitimate purpose or use for the names of the 35,000 union members, nor does it support the court's remarkable supposition that the Subcommittee has a master list of the "subversives" in the American population.

If a legislative purpose, no matter how fantastic, may be conjectured by the appellate court for any demand, no matter how extravagant, the principle that Congressional investigations must have a legislative purpose becomes merely a paper requirement. Yet this has now occurred for the jurisdiction in which most Congressional investigations are held and in a period when abuse of the inquiry power is most prevalent. See Barth, *Government by Investigation* (1955); Taylor, *Grand Inquest* (1955), especially c. IV; Chafee, *The Blessings of Liberty* (1956) p. 221; *United States* v. *Rumely*, 345 U.S. 41, 44.

In *Quinn* v. *United States*, *supra*, at 161, this Court recently said: "The power to investigate, broad as it

may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." The limitations stated by *Quinn* have now been eliminated by the court below. The court has also repudiated the admonition in *Sinclair* v. *United States, supra,* at 292, that "it is well to remember that few, if any, of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

2. If the court below could supply by conjecture a purpose for the Subcommittee's demand, a major question arises as to whether this was a valid legislative purpose.

By the lower court's reasoning, the Subcommittee has power to subpoena the names and addresses of the one and a half million members of the Teamsters Union, of the million members of the United Automobile Workers, and, for that matter, of almost any organization. For it can always be speculated that the Subcommittee desires to check the names of the organization's members against its master list of "subversives."

In this case, it is true, the Subcommittee had derogatory information about some of the organization's leaders. But if such a foundation is necessary, it is

under current conditions, child's play to supply it, particularly for a Subcommittee which can develop derogatory security information about a Republic Attorney General of New York.

The fact that the petitioner's Union was composed of government employees is of no consequence, since that factor was not relevant to the court's theory of pertinency (the Subcommittee, as we have shown, had no theory at all, or if it did, failed to disclose it). In any event, 95% of the members were employed by state, county and municipal governments, and, absent some showing of federal interest, were presumably outside the scope of federal control or regulation. See *Newton* v. *Commissioners*, 100 U. S. 548, 549; *Kentucky* v. *Dennison*, 65 U. S. 66, 107; *Wilson* v. *North Carolina*, 169 U. S. 586, 594; *Florida* v. *United States*, 282 U. S. 194, 211-2.* If production of the membership lists of this Union can be compelled on the theory of the court below, then the membership lists of any union are subject to the same demand.

The importance of this case to the American labor movement as a whole is therefore apparent. This has been recognized in comments condemning the action

---

* Even if it be assumed that the Subcommittee was justified in demanding the names and addresses of the members of the Union who were federal employees, the conviction on both counts must be reversed unless the Subcommittee was also justified in demanding the names and addresses of union members employed by state, county and municipal governments. Both demands were contained in one subpoena, and the petitioner cannot be found guilty of contempt for refusal to comply with the subpoena if any part of it was bad and called for matters not within the authority of the Subcommittee. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 221; *United States* v. *Patterson*, 206 F. 2d 433.

against petitioner in editorials appearing in the May, 1952 issue of the *Catering Industry Employee*, official journal of the Hotel and Restaurant Employees and Bartenders Industrial Union, in the July 1952 issue of the *Carpenter*, official journal of the United Brotherhood of Carpenters and Joiners, and in a statement of policy issued by the Executive Board of United Packinghouse Workers of America, *The Road Ahead*, April 1953. These unions saw the issue in this case as follows:

> "The issue is this: do unions have the right, as the courts have repeatedly held, to hold their membership lists in privacy?
>
> "I think they do. I hope others will join me in speaking out in defense of that right before it is too late." (*Catering Industry Employee.*)
>
> "The right of privacy is something it took organized labor generations to achieve. It is something unions must maintain if the blacklist, labor spying and all the evils of fifty years ago are not to be brought back." (*Carpenter.*)
>
> ". . . In his recent contempt conviction for refusing to turn his union membership lists over to a Congressional investigating committee Abram Flaxer of the United Public Workers was supporting a principle on which any trade union leader would face jail rather than betray his trust." (Packinghouse Workers statement.)

Whether a Congressional committee has power to demand the membership lists of unions is surely an important constitutional question, involving not merely the scope of the inquiry power generally, but also the First, Fourth and Fifth Amendments. Serious constitutional questions are also raised by the holding below that a legislative committee has authority to compile a list of "subversives" and thereby to justify

an insatiable demand for names to check against the list. Nothing in the Constitution sanctions such a compilation, and the First and Fifth Amendments and the bill of attainder clause prohibit it.

3. This case also involves an important question, never decided by this Court, as to what constitutes a quorum of a Senate committee for the purpose of ruling on objections to a subpoena duces tecum.

Under the Senate Rules, at least one-third of the membership of a committee or subcommittee is necessary to constitute a quorum for the "transaction of business," except that a lesser number may be fixed by the committee or subcommittee "for the purpose of taking sworn testimony." See *supra*, pp. 4-5. The lesser number fixed by the Subcommittee here involved is one Senator (R. 34). The question here is whether the smaller quorum authorized only to take sworn testimony is authorized to rule on objections to a subpoena duces tecum.

In the present case, a single Senator presided at the Subcommittee hearing at which petitioner appeared. He overruled petitioner's objection to the absence of a quorum, and, without consultation with any other members of the Subcommittee, overruled his objections to the production of the 35,000 names and addresses of members of his union.[4]

Three of the seven judges of the court below agreed that a full quorum was necessary to rule on petitioner's objections, and that therefore petitioner was not guilty of contempt, his objections not having been validly

---

[4] The contents of the subpoena had not been considered by a full quorum of the subcommittee prior to its issuance, see *supra*, p. 6.

overruled, as required by *Quinn* v. *United States*, *supra*.

The Senate Rule, if read literally, sustains the dissents and petitioner's contention, since the authority of the smaller quorum is limited to the taking of sworn testimony. Furthermore, the legislative history supports a strict construction of the authority of a smaller quorum. The provision for a smaller quorum, made by a recent amendment to Rule XXV, (Sen. Res., 180, *supra*, p. 5) was designed to meet the specific situation created by *Christoffel* v. *United States*, 338 U. S. 84, and its sole purpose was to eliminate a defense of no-quorum to a perjury charge. It was not intended otherwise to enlarge the authority of the smaller quorum. The Report on the Resolution which provided for the smaller quorum stated: (Sen. Rep. 1208, 81st Cong. 2d Sess., p. 1):

> "Adoption of Senate Resolution 180 is intended to meet the problems raised by the Supreme Court's decision [in *Christoffel* v. *United States*, *supra*] by authorizing each Senate committee and subcommittee hereafter to fix the number of its members which shall constitute a quorum for the purpose of taking sworn testimony. The resolution does not otherwise change the existing requirements pertaining to committee quorums contained in the Senate Rules or in the Legislative Reorganization Act of 1946."

Senator Hayden, who managed the Resolution on the Senate floor for the Committee on Rules and Administration, advised the Senate (96 Cong. Rec. 1284):

> "Mr. President, this resolution is designed to take care of the question of a quorum being present in committees when sworn testimony is to be

taken and perjury may be committed. It is to prevent perjury."

Later Senator Hayden stated (*ibid.*): "The resolution merely has to do with the procedure before committees in order to cover the question of perjured testimony."

Standard rules of construction also require that the provision for a smaller quorum, being stated as an exception to a general rule, be construed strictly, so as to avoid having the exception nullify the rule. *Schlemmer* v. *Buffalo R. & P.R. Co.*, 205 U.S. 1, 10; *Piedmont & Northern Ry. Co.* v. *I. C. C.*, 286 U.S. 299, 311-2; *United States* v. *Dickson*, 1 Pet. 141, 165; *United States* v. *Scharton*, 286 U. S. 518, 521-2.

Many of the abuses of the investigative power have been laid to the use of one-man subcommittees. See Barth, *op cit. supra*, pp. 203-4. The decision below extends to such one-man subcommittees, contrary to the Senate Rules, the power to insist on the production of records and documents, no matter how serious are the policy questions involved. Here a single Senator insisted on a demand which had never before been made by a body of the Congress and which affected 35,000 individuals. As Chief Judge Edgerton pointed out in his dissent, a full quorum "might have accepted appellant's view that the subpoena was invalid. Even if it had not accepted that view, it might have concluded that numbers of union members, not their names, were all that the committee needed, and might therefore as a matter of policy have withdrawn the demand for names." (App. B, p. 18).

Certiorari should be granted to determine whether such sweeping authority has actually been committed to one-man subcommittees.

4. This case involves an important question on the applicability of the *Quinn* doctrine of the necessity of a direction. The petitioner, after objecting to the validity of the subpoena, was directed by the sole Senator present to produce the list of names and addresses of union members. He continued to object, asking for reconsideration of this ruling, and as a result was ordered to produce the documents not on that date, but ten days later. The majority below held that he was guilty of contempt on October 5th, the date of the hearing[4] thus making irrelevant Senator Watkins' extension of the subpoena date for production. Judges Edgerton and Bazelon held that under *Quinn* it was necessary to examine the entire proceedings, and that the issue of direction must be resolved on the basis of the final ruling made on petitioner's objections, and not on the basis of an intermediate ruling.

The minority view is clearly the only tenable one under the *Quinn* doctrine. A witness is not "clearly apprised that the committee demands his answer notwithstanding his objections" (*Quinn* at 166), on the basis of a direction made in the course of a colloquy which is altered at the end of further discussion. A witness can only reasonably conclude that he should be guided by the last words of the committee and not by its earlier statements. Indeed, this Court in *Quinn* (at 166, ftn. 34) cited with approval the decision and opinion of the District Court in *United States* v. *Kamp*,

---

[4] The majority agreed with the petitioner's contention that under the indictment and under the case as tried, petitioner was either guilty of contempt on October 5th or not at all, and that the issue of the production or non-production of the list of names after October 5th was not in the case (See App. B. pp. 5-7).

102 F. Supp. 757, in which the defendant was acquitted of contempt on the basis of a colloquy between the defendant and the committee, substantially identical to that which occurred here.

CONCLUSION

This case involves important and novel questions which have been decided by a four to three vote in a manner inconsistent with important principles established by this Court. The importance of the case was recognized by the court below, which took the unusual step of ordering on its own motion a rehearing in banc, thus removing the case from a division the majority of whom voted to reverse the conviction. Certiorari should be granted.

Respectfully submitted,

David Rein
Joseph Forer
711 Fourteenth Street, N. W.
Washington, D. C.
Attorneys for Petitioner.

Appendix A — The Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,027

ABRAM FLAXER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

April Term, 1956

Criminal 1756-52

United States Court of Appeals

for the

District of Columbia Circuit

Filed June 21, 1956

Joseph L. Stewart, Clerk

Appeal from the United States District Court for the District of Columbia

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington and Danaher, Circuit Judges, sitting in banc. (Circuit Judges Bastian and Burger took no part in the consideration or decision in this case).

JUDGMENT

This cause came on to be reheard before the Court in banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On Consideration, Wherefor, It is ordered and adjudged by this Court in banc that the judgment of the said District Court appealed from in this cause be, and the same is hereby affirmed.

Dated: June 21, 1956.

Per Circuit Judge Wilbur K. Miller

Separate dissenting opinion by Chief Judge Edgerton, with whom Circuit Judge Baselon concurs. Separate dissenting opinion by Circuit Judge Fahy.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,657

ABRAM FLAXER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

Decided June 21, 1956

Mr. David Rein, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney at time of argument, and *Lewis Carroll* and *William Hitz*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILSON K. MILLER, BAZELON, FAHY, WASHINGTON and DANAHER, Circuit Judges, sitting en banc. (Circuit Judges BASTIAN and BURGER took no part in the consideration or decision of this case.)

WILSON K. MILLER, *Circuit Judge:* Indicted under 2 U. S. C. § 192[1] for willfully failing and refusing to pro-

---

[1] The statute is as follows:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter

duce at a Senatorial subcommittee hearing on October 5, 1951, certain records required of him by a subpoena *duces tecum* and found guilty by a jury, Abram Flaxer appeals.

The appellant was president of the United Public Workers, a union made up of employees of Federal, state and local governments. In 1951 the Subcommittee on Internal Security of the Senate Committee on the Judiciary received information indicating that he and the other national officer of the union and certain of its directors were members of the Communist Party. Since the organization was therefore apparently dominated at the top by communists, the subcommittee decided to conduct an investigation as to whether its membership was infiltrated by them. To that end, a subpoena *duces tecum* was directed to Flaxer, commanding him to appear before the subcommittee on October 5, 1951, and to bring with him, *inter alia*, a list of the union's members showing which were employed by the Federal Government and which by other governmental units.

The subpoena was served on Flaxer September 19, some two weeks before the date of the hearing. He appeared before the subcommittee on October 5 but did not bring with him the classified membership list, which he said he could have compiled in a week's time. Instead, he read to the subcommittee a previously prepared written statement setting forth his reasons for not obeying the subpoena in that respect, after which Senator Wat-

---

under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

kins (who constituted the subcommittee) directed him nevertheless immediately to produce the required records. He did not do so, and obviously he could not then have produced the list, even had he been disposed to obey after his objections had been overruled, because he had disabled himself by not preparing it in advance. Then, since it was physically impossible for Flaxer to file on that day the list he had not assembled and which it would take him a week to prepare, the Senator ordered him to submit it within ten days. Flaxer responded that he would "have to take that under consideration." He did not submit the membership list to the subcommittee within ten days thereafter, and has never submitted it.

Following the hearing on October 5, the subcommittee filed Report No. 1336 as to Flaxer's contempt in refusing to answer certain questions and in failing and refusing to obey the subpoena *duces tecum*. The Senate adopted a resolution that the Report be certified "under the seal of the United States Senate, to the United States Attorney for the District of Columbia to the end that said Abram Flaxer may be proceeded against in the manner and form provided by law." Senate Resolution 295, 82d Cong., 2d Sess., adopted March 19, 1952.

Thereafter Flaxer was indicted for violating the Code provision to which we have referred by willfully failing and refusing to produce on October 5, 1951, the membership list called for by the subpoena. At his trial, the counsel who had interrogated him on this subject at the hearing was the only witness. Testifying for the Government, he read into the record the portion of the transcript of the appellant's testimony before the subcommittee which had to do with Flaxer's non-compliance with the subpoena *duces tecum*. The appellant did not testify in his own behalf. In charging the jury the trial judge submitted the question whether, on *October 5, 1951*, Flaxer willfully failed and refused to produce the records required by the subpoena. The verdict was that he com-

mitted the offense on that day as charged in the indictment.

As a reason for reversal the appellant says he was not ordered on October 5 to produce the records at the hearing then being conducted and that therefore under the *Quinn* and *Bart* cases[3] he could not be found guilty of a wilful disregard of the subpoena, and was entitled to a judgment of acquittal. With respect to this the appellant says in his brief:

> Accordingly, the issue before the trial court was whether the appellant was guilty of contempt of the command contained in the subpoena by virtue of his conduct at the October 6 hearing. Manifestly, he was not. Under the doctrine of the *Quinn* and *Bart* cases, *supra*, the appellant could not be found guilty of a wilful default of the subpoena unless, after consideration of his objections to the validity of the subpoena, he was directed to produce the records. But he was not so directed. On the contrary, he was told that he need not produce the records then and there but should produce them within ten days. The appellant replied that he would take that order under consideration. In effect, the order contained in the subpoena was vacated, and a new order substituted. The issue of appellant's compliance with this new order is not involved, since the appellant was neither indicted nor tried for a failure to carry out that order. Since there was no direction to produce the records at the hearing, there was consequently no wilful default of the command contained in the subpoena.

The record not only does not support the purportedly factual statements in the above quotation from appellant's brief, but is directly to the contrary. After consideration of his objections to the validity of the subpoena, Flaxer was unmistakably directed to produce the membership list. He was not told he need not produce

---

[3] Bart v. United States, 349 U. S. 219 (1955); Quinn v. United States, 349 U. S. 155 (1955).

the list then and there; the record will be searched in vain for even an intimation to that effect. When Flaxer had completed a lengthy statement of his objections, the following occurred at the hearing:

> Mr. Arens [counsel for the subcommittee]. But you do have the information?
>
> Mr. Flaxer. In a general sense, I think I have the information.
>
> Mr. Arens. And you have not complied with the command of the subpena to produce that information.
>
> Mr. Flaxer. I think it is an improper command, sir.
>
> Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?
>
> Mr. Flaxer. That is the reason I haven't got them.
>
> Senator Watkins. That is the main reason. You are directed by the committee to produce those records *according to the terms of the subpena*. [Our emphasis.][3]

The Senator could hardly have more clearly directed Flaxer, notwithstanding his objections, to produce the records on October 5. The direction was given in conscious compliance with the requirement of the *Quinn* and *Bart* cases, as Senator Watkins knew that Flaxer was unable to obey then and there because he had deliberately failed to prepare himself to do so. In fact, the witness had already said, "I have no such list with me." We conclude that, since there was an express direction to submit the membership list given after Flaxer's objections had been considered, he could be convicted of violating § 192.

The question is then whether the proof justified the jury's verdict that the appellant was in willful default on October 5. That his contumacy was complete on that day is clearly shown by his own testimony before the subcommittee. He testified he did not bring with him the membership records as the subpoena had commanded.

---

[3] Official Reporter's Transcript, page 128.

Did he willfully fail to bring them, as the jury concluded? His own words and conduct answer the question in the affirmative. He could have compiled the membership list prior to the hearing, so that he might be ready to obey the subpoena should the subcommittee reject his objections and direct him to produce the records. He deliberately refrained from making the compilation, from which it is apparent that he had decided in advance he would not obey in any circumstances. He stated at the hearing that he regarded "as an improper command" the subpoena's direction that he bring the records. "That is the reason I haven't got them," he said. This was deliberate and defiant contempt of the United States Senate on October 5, 1951.

It was not until after the appellant had been directed, despite his protest, to produce the records according to the terms of the subpoena, that the chairman ordered him to assemble the information and transmit it to the subcommittee in ten days. Obviously this was because the subcommittee still wanted the information which had been contemptuously withheld from it at the hearing. But the chairman nowhere receded from his earlier ruling that the subpoena was to be complied with, which ruling was given after the witness had said he did not have the records with him. Senator Watkins said nothing which can be construed as excusing or condoning Flaxer's contempt — already complete — in disobeying the subpoena.[4]

If Flaxer had demonstrated good faith by compiling the membership records and sending them to the subcommittee within ten days, perhaps he would not have been indicted for his initial contempt. On that supposi-

---

[4] In order to show the sequence of events and what actually happened at the hearing, we reproduce in an appendix to this opinion pertinent portions of Flaxer's testimony before the subcommittee regarding his failure and refusal to obey the subpoena with respect to the membership list.

tion some may think Senator Watkins—although he did not promise immunity in that event—was affording Flaxer an opportunity to purge himself of contempt. If so, it was an opportunity the appellant did not embrace. He remained recalcitrant, thus affirming and emphasizing the contempt he had originally displayed. That he may have committed another contempt in addition to that of October 5 would seem to be irrelevant.

We next consider the appellant's contention that he was entitled to a judgment of acquittal on his theory that a quorum of the subcommittee did not rule upon his objections to the validity of the subpoena. Senate Resolution 366,[6] which established the subcommittee, authorized it to provide that less than a majority should constitute a quorum "for the purpose of administering oaths and taking sworn testimony," and the subcommittee had decided that one member should constitute a quorum for that purpose. Flaxer argues that the authority to administer oaths and take sworn testimony does not include the authority to rule upon the validity of a subpoena.

The power to receive sworn testimony of course includes authority to rule on objections to questions asked the witness. Receiving documents is obviously a normal ancillary to taking testimony. Professor Wigmore says:[7]

> This testimonial duty to attend and disclose all that is needed for the ascertainment of truth applies to *every form and material of evidence* whatever.
>
> In particular it applies to such evidential material as exists in a person's hands in the form of *documents*. "There is no difference in principle," said a great judge [Shaw, C. J., in Bull v. Loveland, 10 Pick. 9, 14 (1830)], "between compelling a witness to produce a document in his possession, under a subpoena 'duces tecum' (in a case where the party calling the witness has a right to the use of such

[6] 81st Cong., 2d Sess. (1950).

[7] 8 WIGMORE, EVIDENCE § 2198 (3d ed. 1940).

> document), and compelling him to give testimony when the facts lie in his own knowledge." This much is unquestionable; for to give up facts possessed by physical control is no different from the giving up of data possessed as mental impressions.

We think authority to receive sworn testimony includes not only authority to rule on objections to questions but on objections to a subpoena *duces tecum* as well.

In considering appellant's further argument that the pertinency of the membership list called for by the subpoena was not established, it is essential first to ascertain what the subcommittee had been authorized and directed to do, and what it was doing or attempting to do in the hearing of October 5.

The Senate in 1950 authorized and directed its Committee on the Judiciary, or any duly authorized subcommittee, to study and investigate, among other things, the

> . . . extent, nature and effects of subversive activities in the United States . . . including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence . . . .

The Committee was also directed to study the operation of the Internal Security Act of 1950 and other laws dealing with internal security.[5] In accordance with this authorization and direction there was created, in January, 1951, the Subcommittee on Internal Security.

In § 2 of the Subversive Activities Control Act of 1950[6] Congress graphically appraised the activities and

---

[5] S. Res. 366, 81st Cong., 2d Sess. (1950), S. Res. 196, 82d Cong., 1st Sess. (1951) (continuing S. Res. 366).

[6] Title I of the Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. § 781.

purposes of the world communist "movement" and concluded that our form of government is in clear and present danger therefrom.' It was because of Congressional alarm reflected in that Act and other recent legislation that the subcommittee was authorized to study and investigate the extent, nature and effects of subversive activities, including the infiltration of labor organizations by persons who are or may be under communist domination. Against such a background, the pertinency of the membership list demanded by the subpoena is at once apparent. Cf. *Barsky* v. *United States*, 83 U. S. App. D. C. 127, 132, 167 F. (2d) 241, 246, *cert. denied* 334 U. S. 843 (1948); *Marshall* v. *United States*, 85 U. S. App. D. C. 184, 176 F. (2d) 473 (1949), *cert. denied* 339 U. S. 933 (1950). The names could be used to check against a list of subversives to determine the extent of infiltration into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union even though the names of state and local members are included. Regardless of where they were employed, the names of members were pertinent because an investigation of the union was pertinent.

As a final reason for reversal, appellant points out that the indictment charged him with refusing to produce certain records of the United Public Workers of America; that the subpoena served on him in fact called upon him to produce the records of the United Professional Workers of America. This variance, says Flaxer, between the allegation in the indictment and the subpoena actually served on him was in itself fatal to the prosecution and required a judgment of acquittal. The point is frivolous, since Flaxer himself called attention to the inadvertent

---

'This was held to dispense with the need for proof—in a deportation case where the question was pertinent—that the Communist Party advocates the violent overthrow of the Government. Galvan v. Press, 347 U. S. 522, 529-530 (1954).

use of the word "Professional" for the word "Public" in naming the union in the subpoena. He said, "I want to make a minor correction there. Our union is the United Public Workers. . . . Your subpena stated 'Professional Workers.' I recognized it was an error in your identification."

We hold that Flaxer was fairly tried and that his guilt was clearly shown. The judgment pursuant to the verdict must stand.

Affirmed.

Appendix

Official Reporter's Transcript, pages 113-116:

Mr. Flaxer. . . . The item which I have not produced is the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. From the very beginning of the union movement in this country, the rights of unions to privacy of their membership records—

Mr. Arens. You are reading from a prepared statement?

Mr. Flaxer. Yes.

Mr. Arens. Who prepared the statement?

Mr. Flaxer. I did. (Continues:) Has been one of the basic precepts to which the labor movement of America has adhered. Bitter experience has taught American labor that the right to join a union is an empty right unless the fact of membership can be kept private.

Throughout our history, employers and antilabor groups have attempted to violate the secrecy of union records in order to compile blacklists for the sole purpose of destroying unions. This has been amply documented in the hearings of the La Follette committee. After bitter struggles in and out of the Halls of Congress, labor has succeeded in enacting into law this right of privacy. Countless decisions of the

National Labor Relations Board and of our Federal courts have upheld that right. Indeed, the mere query by an employer of an employee as to his union membership has been held to be an unfair labor practice even under the Taft-Hartley Act.

Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present [one] constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists.

Mr. Arens. Do you have such a list?

Mr. Flaxer. I have no such list with me.

Mr. Arens. Do the records of the United Professional Workers reflect such a list? Is the information available, in other words?

Mr. Flaxer. I want to make a minor correction there. Our union is the United Public Workers.

Mr. Arens. I meant the United Public Workers.

Mr. Flaxer. Your subpena stated "Professional Workers." I recognized it was an error in your identification.

Mr. Arens. Did the United Public Workers' organization have the information available which is called for in the subpena?

Mr. Flaxer. Well, we generally have such information.

* * * * *

Official Reporter's Transcript, pages 122-128:

Mr. Arens. Mr. Chairman, I respectfully ask of the chairman that the witness be ordered to produce for this record, in compliance with the subpena duces tecum served upon him, the record[s] of the United Public Workers who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any State, county, or municipal government located anywhere in the United States of America.

Senator Watkins. Do you understand the request made of you?

Mr. Flaxer. Yes; I do.

Senator Watkins. Do you stand on your statement that you refuse to produce those?

Mr. Flaxer. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally—

Mr. Arens. But you do have the information?

Mr. Flaxer. In a general sense, I think I have the information.

Mr. Arens. And you have not complied with the command of the subpena to produce that information.

Mr. Flaxer. *I think it is an improper command, sir.*

Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. Flaxer. *That is the reason I haven't got them.*

Senator Watkins. That is the main reason. *You are directed by the committee to produce those records according to the terms of the subpena.*

Mr. Flaxer. Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. You are the Government. You are the employer. You are as an employer asking for mem-

bership lists. You want your own employees to identify themselves as to their trade-union membership. This is something that has not been done in America for the past 10 or 15 years, and where it has been done, it has been condemned as an unfair labor practice. And I just don't believe, sir——

Senator Watkins. As I understand it, you do not claim any rights under the Taft-Hartley Act, because you have not complied with it, and the Government itself, I think, would be entitled to know of its employees whether or not they are members of a union.

Mr. Flaxer. Then I think they ought to ask the employees. I don't think they are entitled to know, sir. I don't think so. I think the Government as an employer ought to adhere to the general national policy on this question. The general national policy on this question is that an employer has no right to ask a union member whether he belongs to an organization even if he tells that union membership that he doesn't even have to tell him [sic]. There are cases on record, upheld by the Federal courts of the United States, where the employer is enjoined from asking a person whether he belongs to a union, even though there is no punishment attached to it.

Senator Watkins. I would not argue with you for employees outside of the Government service, or State, county and municipal service. I am not going to argue that question because it is not at issue here. But we have here now an organization made up of people who are working for Government and we are asking you specifically for the names of those who are working for Government. You have that within your information and I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ.

Mr. Flaxer. Sir, I don't think the issue has ever come up before.

Senator Watkins. Maybe it has not, but I do not think any court would ever resolve itself against the United States finding out what organization its members belong to.

Mr. Arens. How long would it take you, Mr.

Flaxer, to prepare the information which is called for in this subpena?

Mr. Flaxer. I don't know.

Mr. Arens. Could it be done in a week?

Mr. Flaxer. I imagine it could be done in a week.

Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

Mr. Arens. Who is the vice president of the United Public Workers?

Mr. Flaxer. We don't have a vice president.

Mr. Arens. Who are the national officers of the United Public Workers of America?

Mr. Flaxer. I am, and Mr. Ewart Guinier.

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

Mr. Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual rights as well as trade-union rights far beyond the contemplation of any——

Senator Watkins. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. Flaxer. I haven't got them. I don't feel capable of producing them.

Senator Watkins. You said you could do it within a week.

Mr. Flaxer. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens. *But you have declined to produce it; is that correct?*

Mr. Flaxer. *I haven't produced them.*

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

[All emphasis supplied.]

EDGERTON, *Chief Judge*, with whom BAZELON, *Circuit Judge*, concurs, *dissenting:* On October 5, the date named in the subpoena, appellant appeared before Senator Watkins, the Chairman of the subcommittee. No other member was present. Appellant produced other records called for by the subpoena, but asked the Chairman to withdraw the demand for membership lists, explaining in effect that he considered the lists privileged. After some discussion the Chairman said: "You are directed

by the committee to produce those records according to the terms of the subpoena."

But the Chairman was immediately asked to reconsider this direction. The appellant said: "Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. . . ." The Chairman and the appellant proceeded to discuss the claim of privilege at some length. At the end of this discussion, which occupies a full page of the printed record, the Chairman said, ". . . I do not think any court would ever resolve itself against the United States finding out what organization its members belong to." Mr. Arens, committee counsel, said, "I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time." The Chairman immediately said to the appellant, "Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date."

This seems to me a clear case of immediate reconsideration of an order followed by immediate substitution of a different order.

After some further discussion, the following colloquy occurred: "Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today? Mr. Flaxer. I will have to take that under consideration. Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them." The appellant never produced the records.

The indictment did not charge him with failing to produce the records within 10 days from October 5. It charged that appellant "on October 5, 1951 . . . willfully failed and refused to produce the records . . . ." The

case was tried on that theory alone. This colloquy occurred. "The Court. I expect to tell them to determine it as of the 5th, and that if they find there was no refusal and willful default on that date, that they must find him not guilty even though they believe that he defaulted at some other time. Mr. Hitz [Government counsel]. That's right. I believe that is the law." The court charged the jury: "you are to determine whether on that date, October 5, 1951, the defendant appeared before a subcommittee and then willfully failed and refused to produce the documents and then willfully did make default. If you find that he did not willfully make default at that time and place—that is, on October 5, 1951—then your verdict would be not guilty, even though you may believe that at some other time that he did willfully default. In other words, the question before you is whether there was a willful default on October 5, 1951, when he appeared before the committee."

In *Quinn* v. *United States*, 349 U.S. 155, 165-166, the Court said: "Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to prosecution under §192. Thus if he raises an objection to a certain question—for example, lack of pertinency or the privilege against self-incrimination—the committee may sustain the objection and abandon the question, even though the objection might actually be without merit. In such an instance, the witness's refusal to answer is not contumacious, for there is lacking the requisite criminal intent. . . . In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under §192 for refusal to answer that question." The present appellant was clearly apprised that notwithstanding his objections, the Chairman demanded that he produce the records *within 10 days from October 5*. He was not apprised that, notwithstanding his objections, he must produce the records on October 5.

On the contrary, the Chairman made it clear that he need not produce them on that date and production within 10 days from that date would suffice. It follows that here, as in the *Quinn* case, the District Court should have directed a judgment of acquittal.

The *Quinn* case—which the Supreme Court had not yet decided—requires reversal for another reason as well. Soon after the hearing before the Chairman began, the present appellant raised an objection to the subpoena. He said: "I produced all the items called for in the subpoena except . . . the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. . . . Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. . . . I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpoena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists." Appellant was entitled, and in effect asked, to have his objection to the subpoena considered by "this committee", i.e. the subcommittee. It was not so considered. Under Senate rules, the chairman was a quorum "for the purpose of administering oaths and taking sworn testimony", but he was not a quorum for other purposes. The appellant, as soon as he was sworn, objected to the absence of a quorum. In many cases, including this one, the right to a quorum is more than a technicality. A quorum might have accepted appellant's view that the subpoena was invalid. Even if it had not accepted that view, it might have concluded that numbers of union members, not their names, were all that the committee needed, and might therefore as a matter of policy have withdrawn the demand for names.

In my view it is unnecessary to consider appellant's contention that the demanded records, particularly as to non-federal employees, were not pertinent to the committee's authorized investigation.

FAHY, *Circuit Judge*, dissents on the ground that the Subcommittee had empowered a single member only to administer oaths and to take sworn testimony and this power was not broad enough to include authority in but one member to rule upon objections to the production of documents called for by a subpoena *duces tecum*.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and resolutions involved	2
Statement	4
Argument	11
Conclusion	19

CITATIONS

Cases:

Barsky v. *United States*, 167 F. 2d 241, certiorari denied, 334 U. S. 843 ..... 12, 13, 14, 15

Brousson v. *United States*, 32 F. 2d 844 17

Dennis v. *United States*, 171 F. 2d 986, affirmed, 339 U. S. 162 12

Lawson v. *United States*, 176 F. 2d 49, certiorari denied, 339 U. S. 934 14

Luther v. *Borden*, 7 How. 1 15

McGrain v. *Daugherty*, 273 U. S. 135 14

Marshall v. *United States*, 176 F. 2d 473, certiorari denied, 339 U. S. 933 14

Marford v. *United States*, 176 F. 2d 54, reversed on other grounds, 339 U. S. 258 ..... 12, 14

Ohio ex rel. Bryant v. *Akron Metropolitan Park District*, 281 U. S. 74 15

Oil Workers International Union v. *Elliott*, 73 F. Supp. 942 15

Quinn v. *United States*, 349 U. S. 155 ..... 13, 14, 17, 18

Sinclair v. *United States*, 279 U. S. 263 ..... 13, 14

Townsend v. *United States*, 95 F. 2d 352, certiorari denied, 303 U. S. 654 13

United States v. *Kamin*, 136 F. Supp. 791 12

United States v. *Kamp*, 102 F. Supp. 757 19

United States v. *Josephson*, 165 F. 2d 82, certiorari denied, 339 U. S. 838 ..... 12, 13

United States v. *Lattimore*, 215 F. 2d 847 12

United States v. *Norris*, 300 U. S. 564 14

United States v. *Orman*, 207 F. 2d 148 13

Watkins v. *United States*, No. 261, October Term 1956 ..... 19, 20

	Page
Constitution:	
Section 4, Article 4	15
Statutes and Resolutions:	
Internal Security Act of 1950 (64 Stat. 987, 50 U. S. C. 781, 783)	11, 12
Legislative Reorganization Act of 1946 (60 Stat 812, 831, section 133 (d))	17
S. Res. 189, 81st Cong., 2d Sess. (1950)	4, 16, 17
S. Res. 366, 81st Cong., 2d Sess. (1950)	5, 11, 16
S. Res. 295, 82d Cong., 2d Sess. (1952)	4
Rev. Stat. § 102, as amended, 2 U. S. C. 192	4
Miscellaneous:	
S. Rep. No. 1236, 81st Cong., 2nd Sess.	16
8 Wigmore, *Evidence* (3d ed. 1940), § 2193	16–17

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 462

ABRAM FLAXER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals have not yet been reported (Pet. App. B).

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1956, and a petition for rehearing was denied on July 30, 1956. By order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to and including September 28, 1956, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a membership list of the United Public Workers of America was pertinent to an inquiry of the Senate Subcommittee on Internal Security, authorized to investigate Communist infiltration, where it was shown that national officers of the union and certain members of the governing board were Communists and petitioner, as president of the union, was unable otherwise to give specific information on the membership of the union.

2. Whether, if the union membership list was pertinent to an authorized inquiry of the Senate Subcommittee in these circumstances, the demand for the list could constitutionally be made.

3. Whether a Senate resolution providing that less than one-third of the membership of a committee could constitute a quorum for "the purpose of taking sworn testimony" included the power to rule on objections to requests for the production of documents.

4. Whether, after petitioner had stated to the Senate Subcommittee his reasons for not complying with the request for the documents and had admitted that he did not have them, a direction to produce "according to the terms of the subpena" met the requirements of *Quinn* v. *United States*, 349 U. S. 155.

STATUTES AND RESOLUTIONS INVOLVED

Rev. Stat. § 102, as amended, 2 U. S. C. 192:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before

either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

S. Res. 366, 81st Cong., 2d Sess. (1950) (96 Cong. Rec. 16872) provides in part:

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

SEC. 2. The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the

sessions, recesses, and adjourned periods of the Senate, to hold such hearings, to require by subpenas or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and, within the amount appropriated therefor, to make such expenditures as it deems advisable. * * * Subpenas shall be issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman.

A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.[1]

STATEMENT

Petitioner was indicted on two counts for failure to produce certain records subpoenaed by a Senate subcommittee, in violation of Revised Statutes, Section 102, 2 U. S. C. 192 (*supra*, pp. 2-3) (R. 2-3).[2] Petitioner was found guilty by a jury on both counts and was fined one thousand dollars and sentenced to

[1] This provision is pursuant to S. Res. 190, 81st Cong., 2d Sess. (1950) (96 Cong. Rec. 1284). Unless changed, the rules of one session of the Senate carry over into the next session (R. 35).

[2] See Sen. Res. 295, 83d Cong., 2d Sess. (1954) (98 Cong. Rec. 2500) directing the President of the Senate to certify the report of petitioner's contempt to the United States Attorney for the District of Columbia.

imprisonment for two months (R. 20-21). On appeal to the Court of Appeals for the District of Columbia Circuit, the conviction was affirmed by the court, sitting en banc, by a divided vote.[1]

The facts may be summarized as follows:

In December 1950, the Senate authorized and directed its Committee on the Judiciary, or any duly authorized subcommittee, to study and investigate the administration, operation and enforcement of the internal security laws of the United States and the extent, nature, and effects of subversive activities in the United States (*supra*, pp. 3-4). In accordance with this authorization, the Subcommittee on Internal Security was created in January 1951 (R. 33-34). Shortly after its organization the subcommittee passed a resolution to the effect that one member would constitute a quorum for the purpose of taking testimony (R. 34-35).[2]

On September 13, 1951, the Chairman of the Subcommittee issued a subpoena *duces tecum* directing petitioner to appear before the subcommittee (R. 63). Petitioner had been National President of the United Public Workers of America since 1946 (R. 39). The United Public Workers was an organization of between 35,000 to 50,000 members who were employed by federal, state, county and municipal governments (R. 38). The Subcommittee had information that

---

[1] Chief Judge Edgerton, Judges Bazelon and Fahy dissented. Judges Bastian and Burger took no part in the consideration of the case.

[2] See S. Res. 366, sec. 2, *supra*, pp. 3-4.

petitioner was a member of the Communist Party (R. 51) and he had been described by an associate as a "tried fanatic" of the Party (R. 52).[5] Mr. Ewart Guinier, secretary-treasurer of the union, and the only other national officer (R. 49), was also a member of the Communist Party, according to the Subcommittee's information (R. 53), as were certain members of the board of directors, the governing body of the union (R. 53).[6]

The subpoena directed petitioner to produce and to bring with him the financial records of the union and "records of the union showing names and addresses for all members * * * who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America" (R. 63).

Petitioner appeared on October 5, 1951, before Senator Watkins, sitting as the Subcommittee by designation of the Chairman (R. 37). Immediately petitioner, who was represented by counsel (R. 39), claimed there was no quorum present (R. 39). The objection was overruled by Senator Watkins who stated (R. 38):

> We do have a quorum. Under our rules, which we are to make, one present makes a quorum.

---

[5] Officers of the union were not required to sign non-Communist affidavits in order to represent employees (R. 44-45).

[6] A man who had in the recent past been Negotiations Director of the union was also said to be a member of the Communist Party.

Pursuant to the subpoena, petitioner produced the financial records, but failed to submit the membership lists (R. 40-41). Explaining his failure to produce the membership records, he read a prepared statement in which he asserted (R. 42):

* * * * *

> Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

* * * * *

In the testimony that followed, he stated that he had "no such list" with him (R. 42), but that the union "generally" has such information (R. 43). He testified that there were "approximately" 35,000 members in his union (R. 43) and that he could not tell exactly how many were employed by the Federal Government, but he would estimate "about" five per cent (R. 43). The other 95 per cent were employed by state, county and municipal governments (R. 43);

but petitioner could give only a "general idea" as to the agencies and areas where such membership was concentrated (R. 44). He named three federal agencies[1] in which the "main bulk" of the federal membership was concentrated (R. 43), but declined to name other federal agencies where the union had members because he did not have the "facts" (R. 46). He was thereupon directed to produce the records in accordance with the subpoena *duces tecum* (R. 46–47) and the following transpired (R. 47):

SENATOR WATKINS. Do you understand the request made of you?

MR. FLAXER. Yes; I do.

SENATOR WATKINS. Do you stand on your statement that you refuse to produce those?

MR. FLAXER. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally——

MR. ARENS [counsel to the Subcommittee]. But you do have the information?

MR. FLAXER. In a general sense, I think I have the information.

MR. ARENS. And you have not complied with the command of the subpena to produce that information.

MR. FLAXER. I think it is an improper command, sir.

---

[1] Those agencies were the Bureau of Engraving, Post Office Department, and the Veterans Administration (R. 43).

SENATOR WATKINS. That is the reason you have refused to bring them here today, because you think it is improper?

MR. FLAXER. That is the reason I haven't got them.

SENATOR WATKINS. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpena.

Mr. Flaxer persisted in his contention that the Subcommittee was "infringing on a right that workers in America have, including federal employees" (R. 47). In response to further questioning he told the subcommittee that the required lists could be prepared in a week (R. 49). Thereupon, the following colloquy occurred (R. 49–50):

SENATOR WATKINS. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

* * * * *

MR. FLAXER. I haven't got them. I don't feel capable of producing them.

SENATOR WATKINS. You said you could do it within a week.

MR. FLAXER. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

MR. ARENS. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens. But you have declined to produce it; is that correct?

Mr. Flaxer. I haven't produced them.

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

The Subcommittee never received the membership list (R. 71).

At his trial, petitioner did not take the stand. However, the defense introduced in evidence a copy of a letter, dated October 13, 1951, addressed by petitioner to Senator Watkins (R. 75). In this letter he repeated the text of the prepared statement he had read to the Subcommittee on October 5 (R. 76–77).[9] He concluded by stating (R. 77):

> During the time that has elapsed since the date of that hearing, I have again given due consideration to the committee's request for those membership lists and have come to no other conclusion than that given to you on October 5th, as quoted above; and, therefore, again reiterate my request that the committee withdraw its demand for the membership lists.

Senator Watkins did not receive the letter (R. 74–75).

---

[9] Compare R. 76–77 with R. 41, 42.

ARGUMENT

1. Petitioner first contends that the subpoena directing him to produce before the Senate Subcommittee on Internal Security the membership lists of the United Public Workers of America was an "intrusion into private matters," not supported by any showing of a legislative purpose or pertinent to the matter under inquiry (Pet. 11).

The Subcommittee was created pursuant to a Senate resolution which authorized and directed the Committee on the Judiciary to study and investigate the "extent, nature and effects of subversive activities in the United States * * * including * * * *infiltration* by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement" (*supra*, pp. 3-4; emphasis added). The Committee was also directed to make a complete study and investigation of the Internal Security Act of 1950 (64 Stat. 987; 50 U. S. C. 781), which was enacted on the basis of a Congressional finding that "[t]here exists a world Communist movement * * * whose purpose it is by * * * infiltration into other groups * * * and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world" (64 Stat. at 987; 50 U. S. C. 781) and that this movement presented "a clear and present danger to the security of the United States and to the existence of free American institutions" (64 Stat. at 988; 50 U. S. C. 781).

It is thus apparent that the Subcommittee was expressly directed to make an inquiry into Communist

infiltration into groups and organizations within this country. The power of Congressional committees to make such an investigation has been consistently upheld. *Dennis* v. *United States*, 171 F. 2d 986, 987–988 (C. A. D. C.), affirmed on other grounds 339 U. S. 162; *Barsky* v. *United States*, 167 F. 2d 241, 243–247 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States* v. *Josephson*, 165 F. 2d 82, 90–1 (C. A. 2), certiorari denied, 333 U. S. 838; *Morford* v. *United States*, 176 F. 2d 54, 57 (C. A. D. C.), reversed on other grounds, 339 U. S. 258; *United States* v. *Lattimore*, 215 F. 2d 847, 850 (C. A. D. C.); *United States* v. *Kamin*, 136 F. Supp. 791, 800–801 (D. Mass.).

Further, an inquiry into the membership lists of the union was pertinent to this subject of investigation. The Subcommittee had information it deemed reliable that the national officers of the union were Communists, as were certain members of the board of directors (*supra*, pp. 5–6). Such evidence indicated that the union might be a Communist-front organization,* and to inquire into that possibility—to try to find out how many of the union's members were members of, or affiliated with, the Communist Party, or under its domination at the time of the inquiry—was relevant to the investigation directed

* A "Communist front organization," as defined by the Internal Security Act of 1950 (64 Stat. 987, 989–990; 50 U. S. C. § 782 (4)) means "any organization * * * which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 781 of this title."

by the Senate. As was stated in *Townsend* v. *United States*, 95 F. 2d 352, 361 (C. A. D. C.), certiorari denied, 303 U. S. 664:

> A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress. McGrain v. Daugherty, 273 U. S. 135 * * *. A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad.

See also *United States* v. *Josephson*, 165 F. 2d 82, 89–90 (C. A. 2), certiorari denied, 333 U. S. 838; *Barsky* v. *United States*, 167 F. 2d 241, 243–247 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States* v. *Orman*, 207 F. 2d 148, 153–154 (C. A. 3).

Petitioner errs when he says that the decision of the court below, in holding pertinent the demand made upon petitioner, has "eliminated" the limitations expressed in *Quinn* v. *United States*, 349 U. S. 155, 161 and in *Sinclair* v. *United States*, 279 U. S. 263 (Pet. 12–13). Those limitations concerned inquiries into private affairs, not justified by any valid legislative purpose. Where, as in the present case, a valid legislative purpose exists, the authority of Congress cannot be abridged because the private affairs of certain individuals might be affected. *Sinclair* v. *United*

States, supra, pp. 294–295; *McGrain* v. *Daugherty*, 273 U. S. 135, 179–180; 2 U. S. C. 193. "Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively." *Quinn* v. *United States, supra*, p. 160.

For this reason, where subversive infiltration is under inquiry, an individual's membership in a union may be the subject of questioning (*Lawson* v. *United States*, 176 F. 2d 49 (C. A. D. C.), certiorari denied, 339 U. S. 934), and the Federal Government certainly is not compelled to deal at arms length with a union which is comprised in part of federal workers. Furthermore, Congressional inquiries into the personnel of organizations have been sustained by the courts (*Barsky* v. *United States, supra; Morford* v. *United States, supra; Marshall* v. *United States*, 176 F. 2d 473, 474–475 (C. A. D. C.), certiorari denied, 339 U. S. 933)." Petitioner's union is not to be treated on a different basis than other organizations.

2. Petitioner also seems to argue (Pet. 13–16) that, if the demand was pertinent to the Subcommittee's inquiry, then the whole investigation was unconstitutional and petitioner could take advantage of that invalidity. But the same considerations (discussed

---

" See also *United States* v. *Norris*, 300 U. S. 564, where this Court held that a resolution authorizing an inquiry into the names of persons and corporations subscribing to the campaign expenditures of various candidates was within the constitutional powers of Congress.

above, pp. 11–14) which shows the pertinency of the demand also demonstrate the validity of the inquiry of which the demand was a part. And the use to be made by the Subcommittee of the pertinent information to be supplied by petitioner was for the Subcommittee to determine; it cannot be controlled by petitioner or through his device of refusing to produce relevant material.

As for those members of the union employed by state, county and municipal governments, who petitioner contends "were presumably outside the scope of federal control or regulation" (Pet. 14), one justification for the inquiry is found in Section 4, Article 4, of the Constitution which guarantees to every state a republican form of government, and which is for Congress to enforce. *Luther* v. *Borden*, 7 How. 1; *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74, 79–80. The Internal Security Act of 1950, which the Subcommittee was directed to review, was enacted "in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each state a republican form of government" (64 Stat. 987, 989; 50 U. S. C. 781). See also *Barsky* v. *United States*, *supra*, at 246; *Oil Workers International Union* v. *Elliott*, 73 F. Supp. 942 (N. D. Texas).

3. Petitioner contends that "[t]his case also involves an important question, * * * as to what constitutes a quorum of a Senate committee for the purpose of ruling on objections to a subpoena duces tecum" (Pet. 16).

Section 2 of the enabling resolution (S. Res. 366, 81st Cong., 2nd Sess. (1950), *supra*, pp. 3-4), providing that less than a majority of the Subcommittee could constitute a quorum "for the purpose of administering oaths and taking sworn testimony", had its origin in Senate Resolution 180, 81st Cong., 2nd Sess., 96 Cong. Rec. 1284 (1950). Senate Resolution 180 provided in part that "[e]ach standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one-third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony." The report[11] on the resolution makes it clear that the purpose of the provision was to amend the rule as it applies to *hearings* and that the words "taking sworn testimony" were not to be restrictively construed. Thus, the report points out that "[i]n the future a quorum of Senate standing committees and subcommittees *for hearings* will be fixed and made absolute" and that "this resolution, in addition to meeting the objections raised by the Christoffel decision, will facilitate the maintenance of committee quorums at *hearings*" (emphasis added).

The power to take sworn testimony, as well as the power to conduct a legislative hearing, includes the authority to rule on objections to questions asked a witness and to receive documents as a normal ancillary to the taking of testimony. "[T]o give up facts possessed by physical control is no different from the giving up of data possessed as mental impres-

[11] S. Rep. No. 1908, 81st Cong., 2d Sess. 1-3.

sions". (8 Wigmore, *Evidence*, § 2193 (3d ed. 1940). See also the opinion of court below (Pet. App. B, 7–8) and *Brownson* v. *United States*, 32 F. 2d 844, 847 (C. A. 8).

Petitioner emphasizes that "a single Senator" insisted on a demand which had never before been made by a body of the Congress (Pet. 18). However, petitioner's claim was considered by the Subcommittee as a whole, and his rights were adequately protected. A majority of the Subcommittee was required to report petitioner's contumacy to the Senate" and it required action by the Senate itself to certify the fact of petitioner's contempt to the U. S. Attorney (*supra*, p. 4, fn. 2). Furthermore the Committee members kept in constant touch with each other in matters affecting the business of the Subcommittee, particularly on questions as to whom would be subpoenaed (R. 60); and the subpoena was signed by the Chairman of the Committee (Gov. Ex. 5, R. 63–64; R. 53) under the power conferred upon him in Section 2 of the enabling resolution (*supra*, pp. 3–4).

4. Finally, petitioner contends that "[t]his case involves an important question on the applicability of the *Quinn* doctrine of the necessity of a direction" (Pet. 19). According to *Quinn* v. *United States*, 349 U. S. 155, 165–166, a witness cannot be found guilty

---

*Senate Resolution No. 180 incorporated by reference Section 133 (d) of the Legislative Reorganization Act of 1946 (60 Stat. 812, 831) which provided that "[n]o measure or recommendation shall be reported from any such Committee unless a majority of the Committee were actually present."

of "a deliberate, intentional refusal to answer" if "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections * * *." "So long," continues the opinion, "as the witness is not forced to guess the committee's ruling, he has no cause to complain" (*id.* at 170). There was nothing dubious about the Subcommittee's rulings in this case. Even though petitioner had stated his reasons for not complying with the subpoena and had already said "I have no such list with me," the subcommittee nevertheless directed him to produce the records "according to the terms of the subpoena" (*supra*, p. 9). Such a direction, after petitioner's objection had been considered, was a careful compliance with the requirement of the *Quinn* case.

It is true that, following this direction and petitioner's reiterated refusal, the Subcommittee then ordered him to produce the records within ten days.

"On the question of whether the proof justified the jury's verdict that petitioner was in wilful default, the Court of Appeals stated (Pet. App. B, 6):

> "He [petitioner] could have compiled the membership list prior to the hearing, so that he might be ready to obey the subpoena should the subcommittee reject his objections and direct him to produce the records. He deliberately refrained from making the compilation, from which it is apparent that he had decided in advance he would not obey in any circumstance. He stated at the hearing that he regarded "as an improper command" the subpoena's direction that he bring the records. "That is the reason I haven't got them," he said. This was deliberate and defiant contempt of the United States Senate on October 5, 1951."

See also the trial court's instructions to the jury (R. 91–92).

But the purpose and effect of making such an order was aptly set forth by the Court of Appeals when it stated (Pet. App. B. 6):

> Obviously this was because the subcommittee still wanted the information which had been contemptuously withheld from it at the hearing. But the chairman nowhere receded from his earlier ruling that the subpoena was to be complied with, which ruling was given after the witness had said he did not have the records with him. Senator Watkins said nothing which can be construed as excusing or condoning Flaxer's contempt—already complete—in disobeying the subpoena."

CONCLUSION

For the reasons set forth above, we submit that the decision below is correct and need not be reviewed. However, we note that the Court has recently granted certiorari in another case involving contempt of a Congressional Committee. *Watkins* v. *United States*, No. 261, this Term. The *Watkins* petition presents a number of questions, only one of which is possibly related to a question presented in the instant case—the constitutional issue discussed *supra*, at pp. 14–15."

---

[14] *United States* v. *Kamp*, 102 F. Supp. 757 (D. D. C.), cited by petitioner (Pet. 19), is distinguishable because, as pointed out in the opinion, there was no direction to produce the records after petitioner had advised the committee that he did not have them (102 F. Supp. at 759).

[15] The *Watkins* petition did not claim that the inquiry of the Committee involved in that case exceeded its mandate from the House of Representatives, nor did it claim, aside from the

In view of the number of questions raised in the *Watkins* case, we are not certain of the factors which impelled the Court to grant certiorari there. In *Watkins*, the contempt was the refusal to answer questions concerning Communist Party membership of past associates of the petitioner in the labor movement. Here, the contempt was the refusal to produce records of a union (whose members were employees of federal, state, county and municipal governments) showing the names and addresses of the members thereof. If the Court should be of the opinion that the constitutional issues in the two cases are sufficiently interrelated, we urge that in any event review here be limited to the question whether the Senate Subcommittee on Internal Security could constitutionally require production of the membership list of the United Public Workers of America, the list being pertinent to an authorized inquiry of the Subcommittee.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

WILLIAM F. TOMPKINS,
Assistant Attorney General.

CHARLES E. THOMPSON,
DORIS H. SPANGENBURG,
Attorneys.

OCTOBER 1956.

---

constitutional issues presented, that the questions asked of Watkins were not pertinent to an inquiry being undertaken by the Committee.

U. S. GOVERNMENT PRINTING OFFICE, 1956

FILED
NOV 8 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 462

ABRAM FLAXER, *Petitioner*,

v.

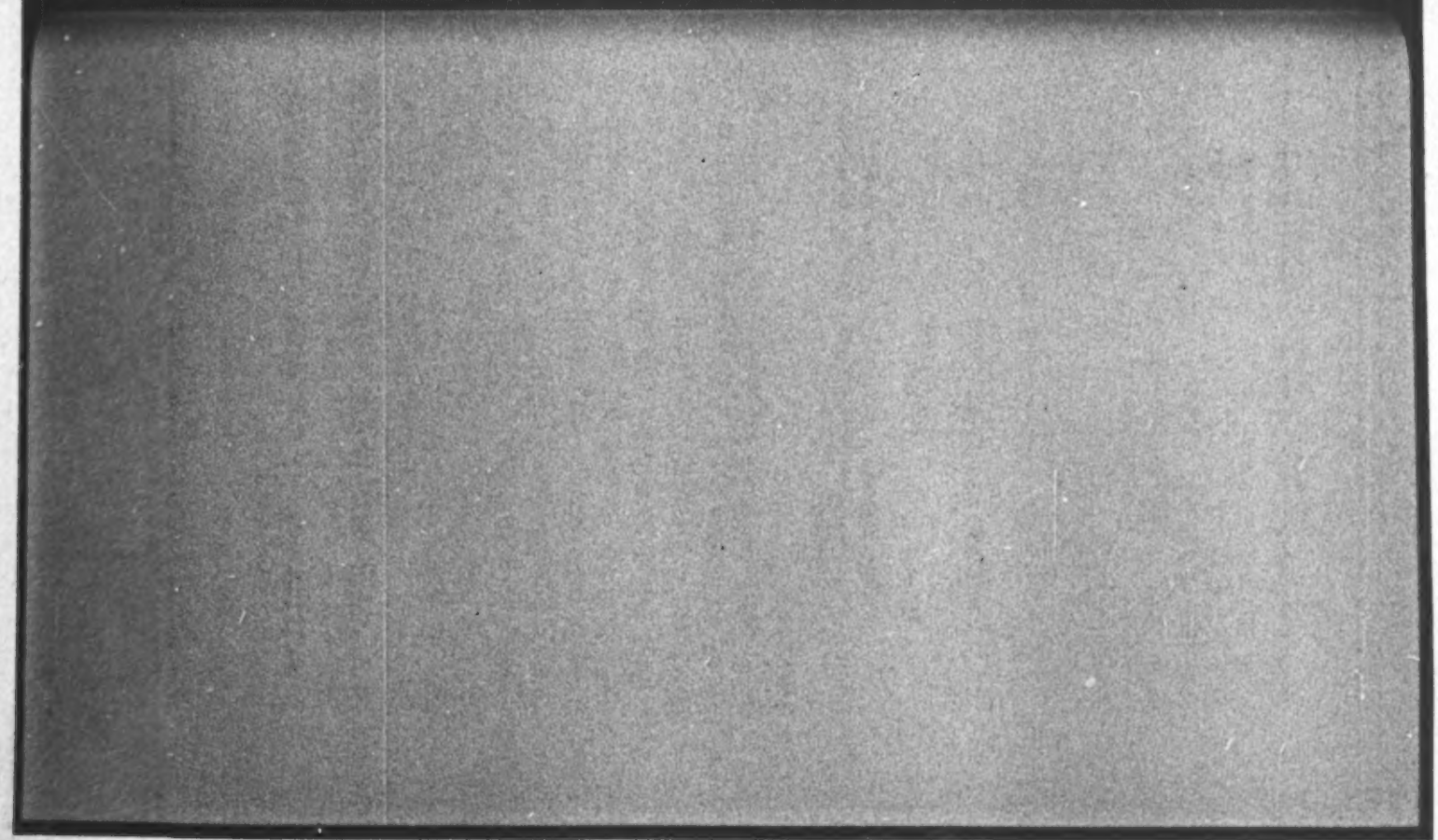
UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO GOVERNMENT'S OPPOSITION

DAVID REIN
JOSEPH FORER
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 462

ABRAM FLAXER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY TO GOVERNMENT'S OPPOSITION

1. The government seems to acknowledge (Opp., 19-20) that in view of the grant of certiorari in *Watkins* v. *United States,* No. 261, this Term, certiorari should be granted here. It urges, however, that review be limited to whether the Subcommittee could constitutionally require production of the Union's membership list, "the list being pertinent to an authorized inquiry of the Subcommittee."

Pertinency and constitutionality are, however, intimately connected subjects. The government itself

says (Opp. 14-5) that "the same considerations . . . which show the pertinency of the demand also demonstrate the validity of the inquiry of which the demand was a part." Limitation of review in the fashion proposed by the government would emasculate the issue of constitutionality and stack the cards against petitioner.

2. Furthermore, the issue of pertinency in this case is of great and general importance. The initial question here is whether pertinency is something which may be conjectured or, as has heretofore been thought, something which must be proved. That the government's case rests on conjecture appears from the Opposition itself, which asserts several grounds of legistative purpose and pertinency, none of which rests on evidence or corresponds to the facts and all of which are of doubtful validity.

The government says (Opp. 12) that the Subcommittee could within its authority "try to find out how many of the union's members were members of, or affiliated with, the Communist Party, or under its domination at the time of the inquiry." The difficulties with this proposition are these: (1) There is no evidence, and the government cites none, that this was the Subcommittee's purpose. (2) If this was the purpose, there is no evidence that the demand for the list of Union members was pertinent to it. The government does not explain how a list of the 35,000 Union members would inform the Subcommittee who were Communists or Communist sympathizers. It is careful not to adopt the offensive notion of the court below (also conjectural) that the Subcommittee has a master-list of subversives in the American population against which it can check names. But no substitute

suggestion is made, and there is no basis for any in the evidence. (3) There is no showing, and no explanation is made, of what legislative purpose would be served by the Committee's informing itself (if it could) of who, if any, among the Union's members were Communists or Communist sympathizers.

The government's suggestion (Opp. 12) that the Subcommittee could have been investigating to determine whether the Union was a Communist-front organization under the Internal Security Act has the same defects and others of its own. There is no evidence that this was the Subcommittee's purpose, and there is no evidence or suggestion of how such a purpose would be forwarded by obtaining the Union's membership list. Furthermore, the task of determining what organizations are Communist-fronts under the Internal Security Act is a function of the Subversive Activities Control Board and the courts, not of the Subcommittee. If this was the Subcommittee's purpose, its inquiry runs afoul of the admonition in *Quinn* v. *United States*, 349 U. S. 155, 161, that "the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary."

Finally the Opposition (p. 15) justifies the Subcommittee's demand by supposing that the Subcommittee was conducting the inquiry for the purpose of preserving a republican form of government in the states. This imaginative proposition has no basis in the evidence. It was not advanced by the Subcommittee, nor did it occur to the court below. Nor does the Opposition explain how the Subcommittee would

have been able to advance this objective by getting the Union's membership list.

3. Certiorari was granted in *Watkins* after we filed our petition. It is now appropriate to point out that the questions involved here go far beyond those which were accepted for review in *Watkins*. The demand in this case was far more sweeping than the narrow questions put to Watkins as to whether a handful of specific individuals had been members of the Communist Party. This case represents an encroachment on the rights of privacy and freedom from defamation of 35,000 individuals, none of whom was shown to have been a Communist, and on the traditions of the American labor movement. Moreover, in *Watkins*, according to the government's opposition to the petition there (at p. 13), the committee making the inquiry had under consideration a specific legislative proposal to which the questions asked Watkins were claimed to be pertinent. No contention of a comparable showing is made in this case, in which the subject matter of the inquiry (if any) and the pertinency of the demand are not revealed by any evidence.

4. The government intimates in its Questions Presented (Opp. 2), though not in its argument, that the Subcommittee's demand was justified because the petitioner was "unable otherwise to give specific information on the membership of the union."

But this still leaves at large the question of what was the purpose and pertinency of "information on the membership of the union." Furthermore, the only such information which the subpoena demanded was the names and addresses of the members.

At the hearing, the petitioner was able to give only approximate information as to the number of Union members in particular agencies and areas (Opp. 7-8). But he had had no advance notice, by the subpoena or otherwise, that any such information was desired, nor would production of the Union's membership list have supplied it. If the Subcommittee was really interested in obtaining such data, it could have requested the petitioner to supply them. There is no basis for assuming he would not have done so, and every reason to suppose that he would. Petitioner's objection to the subpoena went only to the identification of Union members by name, and he furnished all other Union data requested by the subpoena. As Chief Judge Edgerton pointed out in his dissent (see Pet., 18), if a quorum of the Subcommittee had considered petitioner's objections, it might well have limited the demand to the numbers of Union members employed in the various agencies. Certainly, petitioner cannot be held guilty of contempt for refusing to furnish the names of the members on the speculation that the Subcommittee really wanted, but did not ask for, the names of the agencies in which they were employed.

5. The government does not contest the importance of the procedural questions raised in this case—what constitutes under the Senate rules a quorum for ruling on objections to a subpoena duces tecum and whether contempt can be predicated on a direction as once given without regard to the modification of the direction before the close of the hearing. It argues, instead, that the majority of the in banc court below was right in its disposition of both points. In support of this argument the government cites no authority on the second question, and its own statement of the facts

(Opp. 18) shows the doubtfulness of its position. On the first question the government quotes a generality from Wigmore and cites a case in 32 F. 2d (Opp. 16-7). Needless to say, neither of these authorities considered the Senate rules.

The procedural questions presented by this case are obviously of public importance and, as shown by the dissent below and our petition, have probably been erroneously decided by the Court of Appeals.

Respectfully submitted,

DAVID REIN
JOSEPH FORER
Attorneys for Petitioner.